NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Exela Enterprise Solutions, Inc. *and* United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International Union, AFL–CIO/CLC. Case 22–CA–272676

May 3, 2021

DECISION AND ORDER

BY MEMBERS KAPLAN, EMANUEL, AND RING

This is a refusal-to-bargain case in which the Respondent, Exela Enterprise Solutions, Inc., is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on February 12, 2021, by United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International Union, AFL–CIO/CLC (the Union), the Acting General Counsel issued the complaint on February 22, 2021, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to recognize and bargain with it following the Union's certification in Case 22–RC–237040. (Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(d). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint and asserting affirmative defenses.

On March 16, 2021, the Acting General Counsel filed a Motion for Summary Judgment. On March 18, 2021, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response to the Notice to Show Cause on April 1, 2021, and the Acting General Counsel filed a reply on April 7, 2021.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the Union's certification of representative based on its objections to the election in the underlying representation proceeding.[1]

In addition, the Respondent contends that the complaint in the unfair labor practice proceeding is *ultra vires*, claiming that it issued following President Biden's unlawful removal of former General Counsel Peter Robb and unlawful appointment of Acting General Counsel Peter Sung Ohr. Even assuming, arguendo, that the Board would have jurisdiction to review the actions of the President, we have determined that it would not effectuate the policies of the Act to exercise this jurisdiction. See *National Assn. of Broadcast Employees & Technicians—the Broadcasting & Cable Television Workers Sector of the CWA Local 51*, 370 NLRB No. 114, slip op. at 2 (2021).[2]

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made

[1] In its answer, the Respondent denies, or partially denies, complaint pars. 6(a), 6(c), 7, 9(a), 9(b), 10, and 11. Those denials hinge on its claim that the Union was not properly certified as the exclusive collective-bargaining representative of the employees in the unit—a claim that the Respondent raised, and the Board rejected, in the underlying representation proceeding. In addition, the Respondent has admitted that it intends to test the certification. Such an admission permits a finding, notwithstanding the Respondent's denials in pars. 9(a) and 10, that the Respondent has failed and refused to recognize and bargain with the Union. *Biewer Wisconsin Sawmill, Inc.*, 306 NLRB 732, 732 (1992).

The Respondent also denies complaint par. 8, which alleges that the Union, by letter, requested that the Respondent recognize and bargain with it. The Acting General Counsel, however, attached the letter as an exhibit to his Motion for Summary Judgment; the Respondent does not dispute the authenticity of that document; and the Respondent admitted, in its response to the Notice to Show Cause, that the Union requested bargaining. Thus, this denial does not raise a disputed issue for hearing. See id. (finding that union requested bargaining based on letters attached to General Counsel's summary judgment motion).

Finally, the Respondent's claim of insufficient knowledge with respect to complaint par. 4 (union status) and its denial of complaint par. 5 (unit appropriateness) do not raise issues warranting a hearing. The Respondent, in the Stipulated Election Agreement, agreed that the Union is a labor organization within the meaning of Sec. 2(5) of the Act and that the specified unit is appropriate within the meaning of Sec. 9(b) of the Act. See *Wismettac Asian Foods, Inc.*, 370 NLRB No. 62, slip op. at 1 fn. 1 (2020) (later denial of fact previously stipulated to in representation proceeding did "not raise any litigable issue in [test-of-certification] proceeding"); *Biewer Wisconsin Sawmill*, 306 NLRB at 732 (same).

[2] As additional affirmative defenses, the Respondent asserts that the complaint fails to state a claim upon which relief may be granted and that it acted in good faith and has not violated the Act. The Respondent, however, has not offered any explanation or evidence to support its bare assertions, and we find these affirmative defenses insufficient to warrant a hearing. See, e.g., *Station GVR Acquisition, LLC d/b/a Green Valley Ranch Resort Spa Casino*, 366 NLRB No. 58, slip op. at 1 fn. 1 (2018) (citing cases), enfd. sub nom. *Operating Engineers 501 v. NLRB*, 949 F.3d 477 (9th Cir. 2020); *GA Decatur SNF LLC d/b/a E. Lake Arbor*, 370 NLRB No. 34, slip op. at 1 fn. 1 (2020). Likewise, the Respondent's remaining affirmative defense, that the Union is not the collective-bargaining representative of the unit, merely recapitulates an argument raised by the Respondent and rejected by the Board in the underlying representation proceeding. It too does not warrant a hearing. See *Wolf Creek Nuclear Operating Corp.*, 366 NLRB No. 30, slip op. at 1 fn. 2 (2018), enfd. mem. 762 F.Appx. 461 (10th Cir. 2019).

in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Delaware corporation, has been engaged in providing mail, shipping/receiving, and hospitality services to commercial office clients from its 1 Squibb Drive, New Brunswick, New Jersey facility.

During the 12-month period preceding issuance of the complaint, in the course and conduct of its business operations, the Respondent purchased and received at its New Brunswick, New Jersey facility goods and supplies valued in excess of $50,000 directly from suppliers located outside the State of New Jersey.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held on March 29, 2019, the Union was certified on August 13, 2020,[3] as the exclusive collective-bargaining representative of the Respondent's employees in the following appropriate unit within the meaning of Section 9(b) of the Act:

> All Full-Time and Regular Part-Time Customer Service Associates, including Customer Service Associates — Coffee Associates, Customer Service Technical Specialists, Team Leads, Forklift Operators, CSA TS Client Services, TL Tech Services, Shipping and Receiving Hazmat Associates, employed by the Employer at its 1 Squibb Drive, New Brunswick, New Jersey facility, excluding all Office Clerical employees, Professional employees, Guards and Supervisors as defined in the Act, and all other employees.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

[3] By unpublished Order on January 5, 2021, the Board denied the Respondent's request for review of the Regional Director's Decision and Certification of Representative.

B. Refusal to Bargain

About January 5, 2021, the Union, by letter delivered via certified mail, requested that the Respondent recognize the Union and bargain collectively with it as the exclusive collective-bargaining representative of the employees in the unit. Since about January 5, 2021, the Respondent has failed and refused to recognize and bargain with the Union.

We find that the Respondent's conduct constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since about January 5, 2021, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning on the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964).

ORDER

The National Labor Relations Board orders that the Respondent, Exela Enterprise Solutions, Inc., New Brunswick, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International Union, AFL–CIO/CLC (the Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All Full-Time and Regular Part-Time Customer Service Associates, including Customer Service Associates—Coffee Associates, Customer Service Technical Specialists, Team Leads, Forklift Operators, CSA TS Client Services, TL Tech Services, Shipping and Receiving Hazmat Associates, employed by the Employer at its 1 Squibb Drive, New Brunswick, New Jersey facility, excluding all Office Clerical employees, Professional employees, Guards and Supervisors as defined in the Act, and all other employees.

(b) Post at its New Brunswick, New Jersey facility copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 5, 2021.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 22 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 3, 2021

Marvin E. Kaplan, Member

William J. Emanuel, Member

John F. Ring, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International Union, AFL–CIO/CLC (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

[4] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following appropriate bargaining unit:

> All Full-Time and Regular Part-Time Customer Service Associates, including Customer Service Associates—Coffee Associates, Customer Service Technical Specialists, Team Leads, Forklift Operators, CSA TS Client Services, TL Tech Services, Shipping and Receiving Hazmat Associates, employed by us at our 1 Squibb Drive, New Brunswick, New Jersey facility, excluding all Office Clerical employees, Professional employees, Guards and Supervisors as defined in the Act, and all other employees.

EXELA ENTERPRISE SOLUTIONS, INC.

The Board's decision can be found at www.nlrb.gov/case/22-CA-272676 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.